CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

1000 FRIENDS OF WASHINGTON, *et al*., and JERRY HARLESS, *pro se*,	)	**CPSGMHB Case No. 04-3-0031c**
	)	***[1000 Friends/KCRP]***
Petitioners,	)	
v.	)	
KITSAP COUNTY,	)	
Respondent, and	)	**ORDER DENYING RECONSIDERATION**
RICHARD BJARNSON,	)	
Intervenor, and	)	
OVERTON & ASSOCIATES, *et al.*,	)	
Amici Curiae	)	

I. BACKGROUND

On June 28, 2005, the Board issued its Final Decision and Order in this case.

On July 11, 2005, the Board received Petitioner Harless' Request for Reconsideration of Final Decision and Order **(Harless Motion)** and Futurewise's and Kitsap Citizens for Responsible Planning's Motion for Reconsideration (**Futurewise Motion).** On July 13, 2005, the Board received Response of *Amici* to Motion for Reconsideration **(*Amici* Response).** On July 18, 2005, the Board received Kitsap County's Response to Motions for Reconsideration of the Final Decision and Order **(County Response).**

The Board did not request any further briefing.

II. DISCUSSION

WAC 242-02-832 - Reconsideration - provides:

> (1) After issuance of a final decision any party may file a motion for reconsideration with a board in accordance with subsection (2) of this

> section. Such motion must be filed within ten days of service of the final decision. The original and three copies of the motion for reconsideration shall be filed with the board. At the same time, copies shall be served on all parties of record. Within five days of filing the motion for reconsideration, a party may file an answer to the motion for reconsideration without direction or request from the board. A board may require other parties to supply an answer. All answers to motions for reconsideration shall be served on all parties of record.
> (2) A motion for reconsideration shall be based on at least one of the following grounds:
>
> (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
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> (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
>
> (c) Clerical mistakes in the final decision and order.
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> (3) In response to a motion for reconsideration, the board may deny the motion, modify its decision, or reopen the hearing. A motion is deemed denied unless the board takes action within twenty days of filing the motion for reconsideration. A board order on a motion for reconsideration is not subject to a motion for reconsideration.
> (4) A decision in response to the petition for reconsideration shall constitute a final decision and order for purposes of judicial review. Copies of the final decision and order shall be served by the board on each party or the party's attorney or other authorized representative of record.

Positions of the Parties.

Petitioner Jerry Harless (**Harless**) requests reconsideration regarding the legal issues (Issues 2, 3, and 4) that address the "reasonable measures" requirement of RCW 36.70A.215. Harless states that the Board failed to make a finding as to whether Kitsap County Ordinance No. 158-2004 was "reasonably likely to increase consistency" with failed plan provisions. Harless argues that such a finding is required under RCW 36.05.570(3)(f) and *Low Income Housing Institute v. City of Lakewood (**LIHI**)*, 119 Wash.App. 110, 118-119, 77 P.3d 653 (2003).

Harless contends:

> The clear language of RCW 36.70A.215(4), i.e. "reasonably likely," sets a higher standard than simply to adopt well-intended measures and wait to see if they are effective. In order to be "reasonably likely" to correct the gross inconsistencies which have been occurring, there must be an affirmative expectation in the mind of a reasonable person that the measures taken by the County will increase consistency (increase the proportion and density of growth locating in UGAs and decrease the proportion and density of growth locating in rural areas) **before** those measures are enacted. In other words, the County must exercise care in choosing measures which have a probability of success.

Harless Motion, at 5. Harless argues that the County "never analyzed [the measures] to evaluate their likelihood of success," while Petitioners presented "overwhelming evidence that these measures have not worked in the past and are thus unlikely to work in the future." *Id.* at 6.

Harless also argues that the Board's order "has the unintended consequence of authorizing another series of leapfrogging deadlines" by referencing the required CTED report to the Legislature in December 31, 2007. *Id.* at 7.

Petitioners Futurewise and Kitsap Citizens for Responsible Planning (**Futurewise**) join in Harless' request for reconsideration with respect to Legal Issues 2, 3, and 4. They also request reconsideration of the portion of the Board's FDO concerning George's Corner LAMIRD (Legal Issue 1). Futurewise contends that the Board failed to properly apply the statutory requirement that the logical outer boundary be "delineated predominately by the built environment." RCW 36.70A.070(5)(d)(iv). Futurewise argues that the Board failed to follow the analytic model established by the Western Washington Growth Management Hearings Board in *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, Final Decision and Order (Mar. 5, 2001) and adopted by this Board in *Hensley & McVittie v. Snohomish County* (***Hensley IV***), CPSGMHB Case No. 01-3-0004c, Final Decision and Order (Aug. 15, 2001). Futurewise Motion, at 3, 4.

> Missing from this Board's consideration and the County's process is *first* the identification and containment of the "existing area" of the LAMIRD by the built environment as of 1990…. The physical contours of the land and the presence of wetlands are considerations that are used to draw the LOB *after* the existing area has already been identified and contained by the built environment.

Id. at 6 (emphasis added)

Kitsap County responds that the motions for reconsideration should be denied because they do not "contain information that was not included in [a] pre-hearing brief, or any new arguments not presented at the hearing on the merits." *Citing, Sky Valley et al., v. Snohomish County*, CPSGMHB Bo. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996). County Response, at 2.

The County points out that the Board has no obligation to submit findings of fact or conclusions of law except upon issuance of a determination of invalidity. RCW 36.70A.300; .302. *Id*. at 2-3. The County asserts that Harless misreads the *LIHI* case, and that the Board's rulings here were supported by a specific analysis. *Id*.

In particular, the County disputes Harless' assertion that under the Board's ruling, there will be no accountability for the efficacy of "reasonable measures" until CTED makes its 2007 report to the Legislature. *Id.* at 4. The County points out that RCW 36.70A.215 "requires a check on [the measures] through annual monitoring." The County also points

to the FDO requirement that the County must complete its ten-year review of its UGAs in the next year. The County notes that reasonable measures are required to be implemented and adopted prior to the expansion of a UGA, RCW 36.70A.215(1)(b), and that the County has committed to study additional reasonable measures in its planning efforts. *Id.*

With respect to the George's Corner LAMIRD, Kitsap County responds that Futurewise brings no new arguments to its reconsideration motion, which should thus be dismissed. *Id*. at 5. The County points to *Hensley v. Snohomish County* (***Hensley V)***, CPSGMHB No. 01-2-0004c, Order Finding Compliance in *Hensley IV* and Final Decision and Order in *Hensley V* (June 17, 2002).

> Futurewise also continues to assert that the County can not acknowledge development that took place after 1990 even in its efforts to minimize and contain that development. That is not what was done in [*Hensley V*]. There, the "built environment map" considered included: 1) commercial areas or uses in existence in July of 1990, 2) permitted or vested commercial uses prior to 1990; and 3) permitted or vested uses between 1990 and 2000. *Id*. at 12. The Board noted: "These areas are clearly identifiable and contained within the two nodes delineated in the Clearview LAMIRDs." *Id.* While a Type I LAMIRD may only be designated for areas where uses existed in 1990, it is appropriate for the County to consider what is actually on the ground in its efforts to minimize and contain further development.

County Response, at 6.

Board Discussion

The Board has considered the briefs of Petitioners and Respondent and finds no new arguments that were not already considered in the Board's Final Decision and Order.

The Board specifically acknowledges Kitsap County's summary of the "accountability" provisions that require the County to ensure that the measures it adopts to cure inconsistencies between its plan and on-the-ground development are actually effective.

As to the Overton Response,[1] Overton and Associates, et al., were granted *amicus curiae* status for limited purposes with permission to file an April 18 brief. The Board's March 15, 2005, Order on Motions provides:

> *Amicus* Overton may file a brief in accordance with the briefing schedule set forth for Respondent Kitsap County in the PHO [April 18, 2005].

[1] *Amici* Overton & Associates, et al., submitted a responsive brief contending that Harless' motion for reconsideration would "effectively eliminate the presumption of validity," impermissibly "shift the burden of proof to the County," and require the Board to substitute its judgment for "inherently discretionary" decisions of County officials. Overton Response, at 1, 3.

> *Amicus* … will address only Petitioners' arguments concerning appropriate planning and development regulations for rural areas.

Nothing in Overton's Response to the Harless Motion for Reconsideration goes to rural area planning and development regulations. The Board will disregard the brief of *Amici.*

Conclusion

The Board finds and concludes that Petitioners have not presented a basis for reconsideration of its Final Decision and Order. The motions for reconsideration are **denied.**

III. ORDER

Based on the GMA, Board rules, submittals by the parties, Washington case law, and prior decisions of this Board and other Growth Management Hearings Boards, and having deliberated on the matter, the Board enters the following Order:

- Petitioner Harless' Request for Reconsideration of Final Decision and Order is **denied.**

- Futurewise's and Kitsap Citizens for Responsible Planning's Motion for Reconsideration is **denied**.

So ORDERED this 25th day of July 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

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Edward G. McGuire, AICP
Board Member

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Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300.